

In the Matter of Merchant Mariner's Document No. Z-285519-D3
Issued to: GEORGE W. SCHULTZ

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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GEORGE W. SCHULTZ

This appeal comes before me by virtue of Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 12 April, 1949, the Appellant appeared before an Examiner of the United States Coast Guard at Seattle, Washington, on a charge of misconduct supported by five specifications. The first four specifications allege that while Appellant was serving as second cook on the American SS A. J. CERMAK, under authority of his duly issued Merchant Mariner's Document No. Z-285519-D3, he did:

1. On or about 3 May, 1947, while said vessel was in a domestic port, fail to perform his duties without reasonable cause.
2. On or about 29 April, 1947, while said vessel was in a domestic port, fail to perform his duties without reasonable cause.
3. On or about 1 May, 1947, while said vessel was in a domestic port, fail to perform his duties by reason of intoxication.
4. On or about 3 May, 1947, while said vessel was in a domestic port, desert said ship.

The fifth specification alleges that while Appellant was serving as second cook on board the American SS KEYSTONE STATE, under authority of his duly issued Merchant Mariner's Document No. Z-285519-D3, he did, on or about 11 April, 1949, fail to comply with the order of a Federal subpoena directing him to appear at the hearing which was originally scheduled for 11 April, 1949.

Appellant voluntarily waived his right to representation by counsel and entered a plea of "not guilty" to all the specifications. Subsequently the third specification was dismissed on motion. At the end of the hearing, the Examiner found the first, fourth and fifth specifications and the charge "proved." He found the second specification "not proved."

Based on these findings, the Examiner entered an order revoking said Merchant Mariner's Document No. Z-285519-D3.

In his appeal, Appellant urges that his desertion from the ship was justified because the chief cook had threatened to kill him and, for this reason, he was afraid to sail on the ship.

The Appellant's record disclosed that he had been admonished on 19 October, 1944, for failure to perform his duties satisfactorily. Also, his certificate was suspended for six months with twelve months' probation from 30 June, 1945, for failure to "turn to," refusal to carry out a lawful order, inattention to duty, and improper preparation of food.

FINDINGS OF FACT

On all the dates in 1947 hereinafter mentioned, the Appellant was serving as a member of the crew in the capacity of second cook on board the American SS A. J. CERMAK, under authority of Merchant Mariner's Document No. Z-285519-D3 while said ship was lying at the port of Philadelphia, Pennsylvania.

The copy of the official log of the SS CERMAK dated 3 May, 1947, which was admitted in evidence, states that on 29 April, 1947, Appellant was intoxicated in the morning and did not show up for work until 10:00 A.M. Appellant said this was not true because the trouble did not start until at a later date.

The official log for 3 May, 1947, together with Appellant's own testimony, establishes the fact that Appellant returned aboard the ship drunk, sometime in the early morning of 3 May, 1947. He had in his possession some liquor and created considerable disturbance on the ship. He entered a seaman's room and made immoral advances toward him. He was supposed to go to work at 6:00 A.M. but did not do so. He was called at 7:00 A.M. and told to help with breakfast but Appellant refused saying someone had hit him and he was leaving the ship. Appellant then packed all his belongings in his bag, informed the captain that he was leaving because someone had hit him, and requested the captain to pay him off on mutual consent. Although the captain told him that this could not be arranged during the week-end, Appellant persisted in leaving the ship at approximately 8:00 A.M. without pay and without signing off the articles. By his own admission, Appellant did not intend to return to the ship. After he was ashore, Appellant made no attempt to contact the proper authorities to inform them of his action. He attempted to see the captain by returning to the same berth next day but the ship had shifted berths. Appellant unhesitatingly stated that he had no intention of sailing with the ship at that time but that he just came down to see the captain.

On 8 April, 1949, an Investigating Officer in the Thirteenth Coast Guard District served a lawful subpoena upon the Appellant. He was not able to obey the subpoena because he was in jail at the time at which the subpoena commanded his presence elsewhere. Appellant was released from jail after charges of drunkenness had been proved against him.

OPINION

Considering the specifications in chronological order, it is my opinion that the Findings of the Examiner that the second specification was not proved and the third specification be dismissed should be sustained.

Appellant's own testimony corroborates the prima facie case established by the ship's official log with regard to the first specification. By his own admission, Appellant was supposed to go to work at 6:00 A.M. and he did not go to work at any time on 3 May, 1947.

The fourth specification, which alleges that the Appellant deserted the ship is by far the most serious offense charged in these five specifications. In order to sustain an offense of desertion, the intent to permanently abandon the vessel must be established. Usually this intent must be inferred from other facts since intent is a state of mind not subject to direct proof. But, in this case, Appellant, by his own admissions made under oath, supplied the element of intent necessary to prove the specification by testifying that he had no intention of returning to the ship or of ever sailing with her.

The Examiner very aptly stated:

"The manning and operation of the U. S. Merchant Marine ships is primarily based upon the agreement contained in the ship's articles and no seaman should be allowed to simply get off a vessel because he feels that his shipmates don't like him and may do him bodily harm. Although this offense of desertion occurred in a domestic port, where men to replace the person charged were readily available, the act of desertion in this case was so deliberate, and so abruptly done without justification, that it takes on a more serious aspect than normal cases of this kind."

A seaman's right to leave his vessel in a safe port is nevertheless subject to the provisions of "existing law" (46 U.S.C. 672K) and desertion (46 U.S.C. 701(1)) is "misconduct" under 46 U.S.C. 239 (R.S. 4450) as amended.

Appellant contends, in his appeal, that he was justified in deserting the ship because his life had been threatened. Possibly, under certain extreme circumstances, apprehension of great bodily harm could justify such an offense. But this could not be true in any case where such fear was the outcome of an altercation in which the person charged was partially responsible. The evidence in this case clearly shows that even if any such threat was made, the Appellant was not wholly undeserving of it and certainly not an innocent party to the circumstances which led up to it.

There is not even any convincing evidence that such a threat was made against Appellant's person. In one respect, Appellant has been consistent. He repeatedly stated that he deserted the ship because of fear of grave bodily harm. But he has been grossly inconsistent as to the motivating personality of this damage. In the appeal, he states that, "The Chief Cook threaten my life so I was Scaried to sail the ship" although he did not mention this when he was testifying as to what took place when he saw the chief cook on the morning of 3 May, 1947. But Appellant did testify that he knew desertion was a serious offense but that if he stayed aboard there would be a big fight and also that, "I wasn't going to get a knife in my back because I didn't give them a drink." The latter statement was presumably made in connection with activities aboard which occurred before the chief cook returned on board. Apparently, either Appellant was not threatened at all or he provoked threats from several different sources at different times.

Considering the testimony of the Investigating Officer as well as that of the Appellant, there is ample evidence to sustain the fifth specification. Since his inability to obey the subpoena was due to Appellant's detention elsewhere because of his own misconduct, such lawful detention may not be used as an excuse for failure to appear as required by the subpoena.

For the above reasons and in view of Appellant's previous record, the penalty of revocation herein imposed is not considered to be immoderate.

CONCLUSION AND ORDER

The Order of the Examiner dated 12 April, 1949, should be, and it is, AFFIRMED.

J. F. FARLEY
Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 7th day of July, 1949.